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No. 832

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA EX REL. ANGELO ANTONIO CANTISANI, PETITIONER

v.

R. J. HOLTON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE OF CHICAGO, ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. 1a–5a) are reported at 248 F. 2d 737. The order of the District Court appears at R. 109–110.[1]

JURISDICTION

The judgment of the Court of Appeals was rendered on October 2, 1957. A petition for rehearing was denied on December 4, 1957. The petition for certiorari was filed on March 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] "R." designates petitioner's appendix in the Court of Appeals now before this Court.

QUESTION PRESENTED

Whether the administrative decision denying petitioner's application under Section 243 (h) of the Immigration and Nationality Act of 1952 for relief from deportation to Italy on a claim that he would there be subject to physical persecution constituted an abuse of discretion.

STATUTE INVOLVED

Section 243 (h) of the Immigration and Nationality Act of 1952, 66 Stat. 214, provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

STATEMENT

Petitioner, a native and citizen of Italy, illegally entered this country in February 1949, at Baltimore, Maryland, as a stowaway concealed on an Italian ship. He entered without an immigration visa, intending to remain permanently in the United States (R. 49–51). Following hearings on March 31 and April 16, 1953, before a Special Inquiry Officer (R. 44–55), petitioner was ordered deported under Section 241 (a) (1) of the Immigration and Nationality Act of 1952 as an alien who was excludable at the time of his entry, on two grounds: (1) as a stowaway under Section 3 of the Immigration Act of 1917; and (2) because not in possession of a valid immigration visa in violation of Section 13 (a) of the Immigration Act

of 1924.[2] During the deportation hearing, the Special Inquiry Officer advised that his decision was final unless appealed to the Board of Immigration Appeals (R. 54). No such administrative review of the order was ever sought (R. 71, 82–83).

On April 30, 1953, a private bill (H. R. 4966) was introduced in the House of Representatives for the purpose of granting petitioner permanent residence in this country (R. 71, 195). Thereafter, on May 29, 1953, further investigation was had into petitioner's status before Immigration Investigator R. J. Devlin (R. 193–198). At this investigation petitioner was asked to explain why he could not return to Italy. He answered (R. 197):

> There's no work or means of livelihood for me. In the United States I am earning a living and support my family. I want to become a citizen of the United States. * * *

The bill introduced on petitioner's behalf did not pass.

Thereafter petitioner filed a petition requesting that deportation be withheld under Section 243 (h) of the Immigration and Nationality Act of 1952 (R. 146–150), permitting a stay of deportation if in the opinion of the Attorney General the alien would be subject to physical persecution. After opportunity to present evidence before a deportation officer (R. 202–221), an order was entered by the Regional Commis-

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[2] He was denied the discretionary relief of voluntary departure, "[u]pon consideration of the entire record and particularly the manner in which [he] effected his entry into the United States * * *" (R. 42, 41–43).

sioner finding that petitioner would not be subject to physical persecution if deported to Italy (R. 124).

This order was, in effect, withdrawn when on August 29–30, 1955, petitioner was permitted to present evidence before a Special Inquiry Officer, as required by the amended regulations (R. 221–246). Before any administrative decision was reached, the Regional Commissioner, on November 29, 1955, directed that the evidence be presented before a Special Inquiry Officer who was also an attorney (R. 124). The evidence adduced before that officer on January 19, 1956, may be summarized as follows:

Petitioner testified that he had been a resident of the Village of Sassano, Province of Salerno, Italy, before his departure to the United States; that his wife and three children resided in Sassano in a home he owned; that he had been a self-employed carpenter while in Italy and that his equipment was now being used by his children (R. 128–130). He further stated that under compulsion he had been a member of the Fascist Party for a few months before the end of the war; that he had not been active in that organization, nor in any political organization in Italy (R. 130–131). His claim of persecution derived, he testified, from an incident in 1942 when "some Communist fellows" in Sassano attacked him and broke his leg because he refused "to join them" (R. 131). He believed that they were members of the Communist Party (R. 133), and was afraid "that they are going to kill me if I am going to go over there" because of "what they have done to me in the past"

(R. 134–135). Upon advice of counsel petitioner refused to answer questions as to whether he feared persecution from the Italian Government (R. 135–136), and as to whether he could return to some place in Italy other than Sassano (R. 136). The Special Inquiry Officer made part of the record the transcript of testimony at the deportation hearing in April, 1953, which showed that petitioner designated Italy as the country to which he should be sent in the event he was found deportable (R. 137). Furthermore, the Special Inquiry Officer introduced petitioner's testimony given on May 29, 1953, in which in response to a direct question as to his reasons for not wanting to return to Italy he did not mention that he feared persecution from Communist elements (see *supra*, p. 3). Petitioner refused to answer questions concerning his testimony at these earlier proceedings (R. 136-138).

Petitioner further sought to substantiate his claim of persecution by submitting a number of letters from residents of Sassano to the effect that he had had trouble with a Communist element, and that he would be in danger if he returned (R. 153–182). One of these letters was from the Mayor of Sassano stating that, "[a]s result of a controversy with the Provincial Chamber of Labor of a communistic shade, [petitioner] became persecuted by some people who in the pretended attitude of defending the rights of the workers, were about to ruin him financially and professionally. The local communists were after this man for some time" (Ex. # 21; R. 169-170). None

of the letters identified more specifically the people allegedly "after" petitioner. The Special Inquiry Officer recommended that petitioner's application for Section 243 (h) relief be denied (R. 118–122). On March 5, 1956, the Acting Regional Commissioner rendered an opinion approving such recommendation (R. 114–118). He pointed out (R. 116–117):

> The sole point at issue is whether or not this alien would be subject to physical persecution if deported to Italy at this time. In considering this issue, it has been definitely established by the record that the applicant's claim to past physical persecution and to fear of future physical persecution has been and is still centered in the Village of Sassano, Italy. The reason for past persecution and future fear of persecution is extremely vague. The applicant has testified that he was a member of the Fascist Party in Italy for only one month. He further testified that he has never participated in politics in any way either in Italy or in the United States, although he claims to be a member of the Christian Democratic Party of Italy. By religion, he is a Roman Catholic. According to the census of 1931, 99.6% of the Italians were Catholics. He, therefore has no reason to fear persecution on account of his religion. There has been no evidence submitted that any Italian has ever been persecuted in Italy on account of his race. The Village of Sassano is in the Province of Salerno, southern Italy, with a population of 2614 according to the census of 1936. There has been no evidence presented to indicate that any place in Italy other than this small

Village of Sassano was or would be unsafe for the applicant. He has never taken part in any activity which would cause him to be known anywhere in Italy outside of this Village. Furthermore, there has been no evidence presented to show that the lawful constituted authority in this Village is unable to protect the citizens of this community from any minority group.

Administrative notice must be taken that Italy is a Democratic Republic and that the existing Government controlled by the Christian Democratic Party is solidly in control of the country and has the power, the will, and the ability to prevent the persecution of minority groups or individuals. * * *

* * * the Act itself does not specify nor limit deportation to a particular village, town, or city but to a country as a whole. Should the applicant consider the Village of Sassano to be unsafe or undesirable at the present time, he could establish his residence in a city of Italy where he is unknown and would be safe from alleged communists now in Sassano.

Petitioner instituted habeas corpus proceedings attacking the denial of his application for a stay. On November 1, 1956, the present petition for a writ was denied by the district court (R. 109–110).[3] The Court

[3] This petition for a writ of habeas corpus was originally filed on June 13, 1955 (R. 6–8) and amended on June 17, 1955 (R. 25–31). Hearing thereon was postponed until November 1, 1956 (R. 34–35, 58, 63–64, 65–105). During the interim petitioner was afforded the last two opportunities to present evidence on his 243 (h) application by the Immigration Service. In all, petitioner filed three writs of habeas corpus attacking various

of Appeals affirmed, holding that petitioner had failed to establish that denial of his application for relief from deportation under Section 243 (h) constituted an abuse of discretion (Pet. App. 1a–4a).

ARGUMENT

Petitioner concedes that "the procedural requirements have been duly met" (Pet. 2) in the proceedings conducted pursuant to his application for relief from deportation under Section 243 (h) of the Immigration and Nationality Act of 1952. He argues, however, that the adverse administrative decision was unsupported by the evidence and thus constituted an arbitrary abuse of discretion. This contention is unfounded.

Section 243 (h) relief constitutes a privilege to be granted when in the "opinion" of the Attorney General deportation would subject an alien to physical persecution. It is unrelated to the basic issue of the alien's "right to remain in the United States * * *." *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288, 291 (C. A. 2), certiorari denied, 345 U. S. 928. Consequently, the courts refuse to disturb a determination adverse to the alien unless "the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien," *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392, 395 (C. A. 2), for "[t]he hearing is not the classical administrative

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aspects of the immigration proceedings, all of which were denied (R. 83-84).

hearing wherein the hearing officer must be upheld in his decision if there is substantial evidence to support it, but it is one in which the Attorney General may be advised by the alien as to the basis of his fears." *Namkung* v. *Boyd*, 226 F. 2d 385, 388 (C. A. 9). See also, *United States ex rel. Leong Choy Moon* v. *Shaughnessy*, 218 F. 2d 316 (C. A. 2); *Feng Yeat Chow* v. *Shaughnessy*, 151 F. Supp. 23, 25–26 (S. D. N. Y.); *Lukman* v. *Holland*, 149 F. Supp. 312, 316 (E. D. Pa.).

In this case, petitioner was afforded every opportunity to support his contentions and the evidence he submitted was fully considered by the administrative authorities. The conclusion that he failed to make out a case warranting relief was fully justified. The sum of petitioner's claim was a vague assertion that certain unnamed, unidentified alleged Communists in the Village of Sassano, Italy, acting without official sanction, would seek to harass and persecute him if he returned there. He might as well have based persecution on the allegation that he had a personal enemy in that town. There was no indication that the public officials of Sassano would be unable to protect him from this element, or that his safety would be endangered if he returned to any place in Italy other than the Village of Sassano.

In some respects this claim is similar to that raised in *Lardas* v. *Holland*, 139 F. Supp. 514 (E. D. Pa.), affirmed, 235 F. 2d 955 (C. A. 3). In that case, the alien sought to avoid deportation to Greece under Section 4 of the Displaced Persons Act of 1948, 62 Stat. 1009, as amended—which afforded relief on

grounds similar to those under 243 (h)—claiming that he feared persecution from Communist elements in his native village on an island off the coast of Greece. In upholding the administrative finding denying Section 4 relief, the Court of Appeals pointed out (235 F. 2d at 957):

> Judicial notice may and should be taken that political circumstances in Greece have changed greatly since 1949 and 1950. Certainly they are far from anarchic. In 1955 and 1956 an organized and controlling government exists in Greece. It is not communist dominated and does not sanction communist violence against anti-communists. Another proper subject of judicial notice is that Greece is a considerable country of some eight million inhabitants, while Andros is a very small off-shore island with only one substantial settlement of some three thousand inhabitants.
>
> In these circumstances petitioner's minimal showing of reason to fear return to the little island of Andros in 1949 or 1950 affords no reasonable basis for asserted fear to return to the country of Greece in 1955.[4] * * *

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[4] *D'Antonio* v. *Shaughnessy*, 139 F. Supp. 719 (S. D. N. Y.), held that an alien seeking adjustment of status under Section 6 of the Refugee Relief Act of 1953, 67 Stat. 400, as amended, 68 Stat. 1044, should be afforded the opportunity of submitting to the administrative authorities evidence in support of his claim even if such evidence be that he fears persecution other than from the *de facto* or *de jure* government. In the instant case petitioner was afforded full opportunity to submit such evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1958.